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No. 533

In the Supreme Court of the United States

OCTOBER TERM, 1960

UNITED STATES OF AMERICA, PETITIONER,

STANLEY S. NEUSTADT, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS

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BRIEF FOR RESPONDENTS

QUESTIONS PRESENTED

Whenever an application is made for mortgage insurance under the National Housing Act, an inspection of the premises is made by a qualified professional appraiser, employed by the United States. The inspection here was negligently made. The questions presented are:

1. Does the United States owe a duty to a prospective purchaser of the premises to conduct this inspection with due care?
2. If there is such a duty, is a Federal Tort Claims action for the recovery of damages, resulting from a negligent

inspection, essentially a negligence action or one for misrepresentation?

3. Even if the action is considered to be based upon misrepresentation rather than negligence, does the "misrepresentation" exception in the Federal Tort Claims Act immunize only willful or deliberate misrepresentations or does it also include negligent misrepresentations?

STATUTES INVOLVED

1. Section 203 of the National Housing Act (Act of June 27, 1934, ch. 847, 48 Stat. 1248), as amended, 12 U.S.C. 1709 (1952 Ed., Supp. IV), provided in pertinent part as follows:

(a) The Commissioner is authorized, upon application by the mortgagee, to insure as hereinafter provided any mortgage offered to him which is eligible for insurance as hereinafter provided, and, upon such terms as the Commissioner may prescribe, to make commitments for the insuring of such mortgages prior to the date of their execution or disbursement thereon . . .

(b) To be eligible for insurance under this section a mortgage shall—

(2) Involve a principal obligation (including such initial service charges, appraisal, inspection, and other fees as the Commissioner shall approve) in an amount . . . not to exceed an amount equal to the sum of (i) 95 per centum . . . of \$9,000 of the appraised value (as of the date the mortgage is accepted for insurance),

and (ii) 75 per centum of such value in excess of \$9,000 . . .

2. Section 226 of the National Housing Act (Act of June 27, 1934, ch. 847,, as added by the Housing Act of 1954 (Act of August 2, 1954, ch. 649, § 126, 68 Stat. 607), 12 U.S.C. 1715q, provide in pertinent part as follows:

The Commissioner is hereby authorized and directed to require that, in connection with any property upon which there is located a dwelling designed principally for a single-family residence or a two-family residence and which is approved for mortgage insurance under section 203 . . . of this Act, the seller or builder or such other person as may be designated by the Commissioner shall agree to deliver, prior to the sale of the property, to the person purchasing such dwelling for his own occupancy, a written statement setting forth the amount of the appraised value of the property as determined by the Commissioner . . .

The Federal Tort Claims Act provides in pertinent part as follows:

28 U.S.C. 1346(b)—

Subject to the provisions of chapter 171 of this title, the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2674—

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

28 U.S.C. 2680(h)—

The provisions of this chapter [28 U.S.C. Ch. 171] and Section 1346(b) of this title shall not apply to—

(h) Any claim for damages arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

STATEMENT

The Government has accurately described the relevant provisions of the National Housing Act and the practices followed by the Federal Housing Administration in connection with the issuance of insurance of mortgages secured by existing single family residences. The Government's statement of the particular facts of this case is, however, deficient.

As petitioner has explained (Pet. Br., pp. 57), certain standards of eligibility prescribed by the Federal Housing Commissioner must be met before a house is accepted as adequate security for a mortgage that is to be insured by the FHA. Part of the function of the professional technician who visits the house for the purpose of making an appraisal is to determine whether these standards are met. If a substantial defect is found, he may recommend that the house be rated as eligible for mortgage insurance

provided the defect is remedied. On the other hand, if the deficiency is very serious and cannot be economically corrected, the application for mortgage insurance is rejected.¹

Since insurance is available only after the house has been carefully inspected, a prospective purchaser is thus provided with "the informed judgment of a professional technician"² that the house requires no major or unusual repairs. This practice of the FHA has become well known, certainly to banks, mortgage companies and real estate brokers, and while the record does not reflect whether it was known to the public generally, the respondents were well aware of it.³

Respondents originally made an offer to purchase the property at a price of \$24,500, conditioned upon their being able to obtain an FHA insured loan of \$19,900, the maximum amount permitted under the statute, based upon an appraised value for the property at this contract price.⁴ Subsequently, information was received by the seller to the effect that the FHA had appraised the property at \$22,750, thereby relieving respondents of their obligation to consummate the transaction.⁵

Respondents were concerned lest the difference between the amount of their offer and the appraised value might have resulted from some serious flaw in the house. Consequently, they made inquiries and were explicitly informed that a serious defect would not result in a reduced appraisal but rather in the commitment to insure being conditioned upon the correction of the defect.⁶ Thus reassured,

¹ R. 40-43.

² H. Rept. No. 2271, 83d Cong., 2d Sess., p. 67.

³ R. 15, 17-18, 49.

⁴ R. 16.

⁵ R. 16.

⁶ R. 17-18, 49.

they entered into another contract similarly conditioned upon their obtaining an FHA insured mortgage, but this time in the amount of \$18,800 (the maximum amount insurable under Section 203 on the basis of an appraised value of \$22,750). In due course the transaction was closed and respondents took title to the house.

Soon after taking possession, respondents discovered that their home had suffered a serious foundation failure—indeed, so serious that it was not economically feasible to make the necessary repairs.⁷ The District Court found, and the Court of Appeals adopted the finding, that the defects in the house would have been discovered by the FHA inspector had he conducted his inspection with due care. Since these findings of the lower courts are not contested by the Government, and since the Government does not contend that respondents were guilty of contributory negligence, it seems unnecessary to summarize the evidence of record on these factual questions, even though a considerable part of the Government's statement appears to be devoted to suggesting that the defects might not have been easily discernible by the FHA inspector. There is ample support in the record, however, for the finding that the inspection was negligently conducted.⁸

SUMMARY OF ARGUMENT

The courts below have found that the respondents' cause of action is the common law tort of negligence; that the United States owed respondents a duty to conduct with due care its inspection of the premises which they purchased; and that the inspection was in fact negligently conducted to the respondents' injury. Respondents' alternative contention—that they were entitled to recover

⁷ R. 19-21, 26-31.

⁸ R. 27-28, 31-32, 33, 34, 36-37.

even if their action were to be regarded as one based upon negligent misrepresentation, since such an action is not barred by 28. U.S.C. 2680(h)—was rejected by the courts below.

1. The courts below were correct in holding that the Federal Housing Administration owed respondents a duty to conduct a careful inspection of the home which they purchased, when its eligibility for mortgage insurance was being determined. The Government does not contest that the inspection should have been carefully conducted and that it was not. The issue is determination of the class in whose favor this duty of due care runs. The factors that enter into such a determination include the probability that injury to members of the class will result if due care is not observed, the possible extent of liability that may result from a single negligent act, and the purpose or purposes for which the activity in question has been undertaken.

One of the primary objectives of the Federal Housing Administration mortgage insurance program was to provide a prospective home buyer with a degree of protection not available to the purchaser of a home financed through a conventional mortgage. This protection included the advantage of knowing that before any insurance was issued, he would have "the benefit of a careful disinterested examination of the property." The Congress explicitly stated that "it is the intent of Congress that the HHFA and its constituent agencies . . . shall at all times regard as a primary responsibility their duty to act in the interest of the individual home purchaser and in so doing to protect his interest to the extent feasible." Where a governmental function is carried out pursuant to a statute expressly intended to benefit a class of persons and a member of the class is deprived of that benefit because the function is

negligently performed, it can hardly be argued that there is no liability under the Tort Claims Act because the Government owed that person no duty of care. Such a duty of care would have been owed even in the absence of the vigorously stated Congressional purpose. But the existence of such purpose eliminates any possible doubts on this score.

The Solicitor General's argument that the National Housing Act does not provide an express or implied guarantee of the structural soundness of a house financed by an FHA insured mortgage may be correct, but it is wholly irrelevant to the issues in this case. Liability was imposed by the courts below, under the Tort Claims Act, on the basis of the negligence of the Government's employees, and not upon a warranty under the National Housing Act.

2. Assuming *arguendo* that 28 U.S.C. 2680(h) bars an action for negligent misrepresentation as well as for deliberate misrepresentation, it must be determined, where a chain of events leading to the plaintiff's injury includes some form of communication, whether the action is based upon negligence or upon misrepresentation. The Solicitor General's argument that the existence of any communication whatever makes the action one of "misrepresentation" is untenable and is inconsistent with earlier decisions of this Court and of the lower courts. The issue is whether the negligent act or the incorrect representation is the essential element of the wrongful conduct that gives rise to the action. In some cases, as in this one, the answer will be apparent. In others an appropriate test is whether the duty of due care existed when the negligent act was performed, prior to the communication of the results of that act, or whether the duty, if any, arose in connection with or out of the communication itself. Respondents were injured by the negligent inspection. The results of the in-

spection were recorded and communicated to them. But the injury arose from the underlying negligent act and not from the subsequent report.

3. In any event, the "misrepresentation" exception in 28 U.S.C. 2680(h) does not exclude actions based upon negligent misrepresentation. The exception is found in a section of the Tort Claims Act exempting the United States from liability from most of the recognized common law deliberate torts. The legislative history quite plainly confirms that only deliberate torts were intended to be excluded from the wide acceptance of liability found in the Tort Claims Act. A sensible explanation for this exemption is that the commission of wilful torts of this character is not genuinely a part of the employee's performance of a governmental function but is, as a practical matter, "outside the scope of his employment." There is good reason, therefore, for leaving an injured party to an action against the employee himself rather than against the Government.

The Solicitor General asserts that if "misrepresentation" is read to exclude only actions based upon deliberate misstatements, widespread liability will be visited upon the Government. This is not true. Since the United States is liable under the Tort Claims Act only in circumstances where a private person would be liable, the limitations which the common law courts have found it necessary to impose, where damages in very large amounts could conceivably be traced to a single negligent act, provide adequate protection to the United States. There seems no reason, therefore, not to give the term "misrepresentation" the meaning plainly intended by Congress.

ARGUMENT

I. THE UNITED STATES OWES A DUTY TO PROSPECTIVE HOME OWNERS TO EXERCISE DUE CARE IN INSPECTING PROPERTY WHEN DETERMINING ITS ELIGIBILITY FOR FHA MORTGAGE INSURANCE

A. The theory of this action

Since petitioners's brief evidences a fundamental misconception of the character of respondents' suit against the Government, it is necessary to begin with a statement of some rather basic principles concerning the nature and theory of an action under the Federal Tort Claims Act.

The dominant purpose of the first major portion of the Government's brief—a purpose which underlies the Government's consideration of both the language and the statutory history of the National Housing Act—appears to be to establish that the Housing Act does not provide a purchaser of a home with a guarantee or warranty that it is worth its appraised value.⁹ But of course respondents did not bring their action to enforce a warranty or a guarantee made under the Housing Act or for breach of an implied agreement grounded upon that Act. Rather, respondents sued under the provisions of the Tort Claims

⁹ This is a recurrent contention in Petitioner's brief. "... [T]he concept of the F.H.A. housing program [is one] of insurance of repayment running to the lender-mortgagee, rather than as a guarantee of construction and value running to the purchaser" (Pet. Br. p. 13). "... [N]owhere in the legislative consideration was there ever any hint that the government was insuring or guaranteeing or representing to the home purchaser that he was receiving a certain value for his property" (Pet. Br. 19). "... There is no indication . . . that Congress intended in 1954 to transform the underlying concept of national housing legislation . . . to one of warranty by the government of construction, or guarantee by the government of value received . . ." (Pet. Br. p. 26). "... [I]t cannot be assumed—as respondents in effect contend here—that, as to old buildings or existing homes, Congress intended to have the construction guaranteed by the United States. . . ." (Pet. Br. fn. 41, pp. 25-26). As explained in the text above, respondents make no such contention, in effect or otherwise.

Act, which in 28 U.S.C. 2674 makes the United States "liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances," and in 28 U.S.C. 1346(b) gives the District Courts jurisdiction of claims "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment. . . ." This is a tort action grounded upon negligence, not an action on a warranty or guaranty, express or implied.

The Government's brief also occasionally adds to the warranty argument the contention that neither the Federal Housing Act nor its legislative history indicates that Congress intended to impose upon Government employees a duty of care running in favor of the class of persons of which respondents are members. If by this the Government means to suggest that a claimant under the Tort Claims Act is obliged to establish such a Congressional intent, this is another manifestation of the Government's lack of understanding of the nature of the issues which arise in a tort action. The relevant problem in this case is simply that which recurs in every tort action, namely, the problem of defining the class of persons who may recover for damages suffered as the result of the negligence of the defendant or his agents. The resolution of this problem is a judicial function, and depends primarily upon whether injury to the members of the plaintiff's class is reasonably foreseeable if the action in question is negligently performed.¹⁰ Thus there is no statute that states who may recover for the negligent operation of a lighthouse,¹¹ for the careless fighting of a forest fire,¹² or for the inadequate

¹⁰ 2 Harper and James, *The Law of Torts*, Section 18.2.

¹¹ *Indian Towing Co. v. United States*, 350 U.S. 61.

¹² *Rayonier v. United States*, 352 U.S. 315.

marking of a submerged wreck.¹³ So, too, a duty of care has been found to exist in favor of a passenger on a commercial airliner whose injury is caused by the negligence of a control tower operator,¹⁴ and in favor of motorists on a highway injured by careless action on the part of Government employees who load surplus material on a purchaser's truck.¹⁵ Liability in such tort actions is imposed by the Tort Claims Act, by which the United States has accepted responsibility under general tort principles for the negligent acts of its employees, and not by the statute which authorizes the action which is negligently performed.

We do not mean by this that the purpose of the pertinent provisions of the National Housing Act is irrelevant to the question of whether the Government owed a duty of due care to respondents in the conduct of the appraisal. On the contrary, where Congress has expressed its intent that a certain action be performed for the benefit of a certain class, and where it is apparent that the negligent performance of the action will deprive the intended beneficiaries of the benefits sought to be conferred, there are compelling reasons for the judiciary to determine that those who perform the action owe a duty of due care to these intended beneficiaries. Thus it is highly significant that, as we show below, the Federal Housing Administration, soon after it was established, recognized its obligations to provide protection to the purchasers of single family dwellings. And when it faltered somewhat in carrying out this obligation it was rather sharply reminded of its failure by the Congress. But the Government, apparently in an effort to diminish the force of these legislative materials, seeks

¹³ *Somerset Seafood Co. v. United States*, 193 F.2d 631 (C.A. 4); *Pioneer Steamship Co. v. United States*, 176 F. Supp. 140 (E.D. Wis.).

¹⁴ *Eastern Air Lines v. Union Trust Co.*, 221 F.2d 62 (C.A.D.C.), *aff'd*, 350 U.S. 907.

¹⁵ *Stalik v. United States*, 247 F.2d 136 (C.A. 10).

to persuade the Court to view them with the wrong questions in mind—whether there is a statutory warranty or guaranty, or an explicit statutory assumption of duty of due care. Given their proper significance, these materials eliminate all doubts as to the existence of a duty of due care in this case.

B. A Primary Objective of the National Housing Act is the Protection of Purchasers of Homes

1. *The statutory provisions and their purpose.* The National Housing Act, from the time of its original enactment in 1934, limited the amount of the mortgage that could be insured to a percentage of the "appraised value of the property."¹⁶ In its First Annual Report (at p. 17) the FHA explained how the requirement of an appraisal conferred a benefit upon prospective home owners not available to those who financed the purchases of their homes through conventional mortgages:

"He [the purchaser] will also have what probably only a small percentage of home buyers have ever had in the past: the benefit of knowing the appraised value set upon the property which he intends to buy or build, by a trained valuator acting in accordance with a procedure designed to reduce to a minimum errors that might result from casual or hasty conclusions."

Subsequent reports of the Agency continued to refer to its role in protecting the borrowers whose loans were secured by FHA insured mortgages. In his Second Annual Report the Commissioner pointed out (at p. 6):

"The valuation and inspections made by trained staff

¹⁶ Section 203(b) of the Act, 48 Stat. 1248, as amended, 12 U.S.C. 1709(b).

members of the Administration tends . . . to insure that the dwelling is in good physical condition."

Two years later the Fourth Annual Report stated (at p. 15):

"Although the Federal Housing Administration does not deal directly with the great majority of mortgagors whose home mortgages are insured it is responsible for acquainting present and potential home owners with the terms of the Federal Housing Administration insured mortgages and with the protection afforded to the borrowers under such a mortgage."

A similar statement was included in the Fifth Annual Report (at p. 21) and was followed by the declaration that:

"The Administration aims that no home owner or home seeker should through ignorance of the insured mortgage plan (1) pay more for the same type of credit, nor (2) incur unnecessary risks through the use of a short-term mortgage, nor (3) enter into a transaction without having the benefit of a careful, disinterested examination of the property."

See also the Sixth Annual Report at p. 9; the Eleventh Annual Report at p. 9; and the Twelfth Annual Report at p. 8.

It is evident from the legislative history of the Housing Act of 1954 that these benefits to prospective home owners were not simply incidental advantages resulting from the mortgage insurance program, but were rather among the principal objectives sought to be achieved.¹⁷ The 1954 Act, which was passed after extensive hearings and Congress-

¹⁷ Hearings Before the House Committee on Banking and Currency on the Housing Act of 1954, 83d Cong., 2d Sess.; Hearings Before the Senate Committee on Banking and Currency on the Housing Act of 1954, 83d Cong., 2d Sess.

sional investigations of the FHA,¹⁸ was a broad measure designed to correct a variety of problems that had arisen in the administration of the housing program. Thus, as the Government has stated, the Act contained amendments that affected many of the programs administered by the Housing and Home Finance Agency, the parent body of the FHA; and considerable attention was given to abuses that had come to light involving the administration of the Title I program (home improvement loan insurance) and the so-called Section 608 Housing Program (multi-family rental properties). But what is important for present purposes is Congress' serious dissatisfaction over the performance of the FHA in connection with its program of mortgage insurance on small homes, both newly constructed and existing.

The Senate Report contains in its introductory section a paragraph, entitled "The Protection of the Consumer," which reflects this concern:

"While your committee has included a number of tightening amendments and safeguards against possible abuses and irregularities in the administration of the various housing programs, it feels that there is a need for a change in the approach or philosophy of administration that the Federal Housing Administration appears to have manifested thus far. While naturally and properly the FHA should be concerned with protecting its insurance fund, the building and the mortgagee against loss and encouraging profitable programs of construction, and while your committee fully

¹⁸ Hearings Before the Senate Committee on Banking and Currency, FHA Investigation, 83d Cong., 2nd Sess.; Hearings Before a Subcommittee on Housing of the House Committee on Banking and Currency Conducted under Veterans Administration and FHA Program, 82d Cong., 2nd Sess.

appreciates, as it has stated in the opening paragraphs of this report, the importance of maintaining a high level of housing production, these objectives should not obscure the fact that, the *first* responsibility of Congress, and that of any agency administering part or all of the housing program, is to protect and preserve the public interest, in general, and the rights of home owners, in particular. It is your committee's considered opinion, and unless contrary views are expressed or amendments are offered, *that it is the intent of Congress that the HHFA and its constituent agencies in their administration of the program which they are authorized to carry out shall at all times regard as a primary responsibility their duty to act in the interest of the individual home purchaser and in so doing to protect his interest to the extent feasible.*" (Emphasis supplied.) S. Rept. 1472, 83d Cong., 2d Sess., p. 4.

The bill reported by the Senate and the Act, when adopted, required the builder of a new house to furnish the buyer with a certification that the dwelling was constructed in accordance with plans and specifications on which the FHA or Veterans Administration based its valuation. The Senate Report (at p. 19) explained, however, that:

"While this affords a measure of protection to the purchaser it does not protect him against all structural defects, poor materials, or poor workmanship. Basically the home owner is dependent upon sound underwriting by the FHA and VA and an effective inspection and compliance program, and your committee would like to direct the attention of the FHA and VA to the importance it attaches to them."

At a later point in the report (p. 48) it was emphasized:

"It should be noted, as was discussed earlier in the report that the requirement of certification is only supplemental to the compliance inspection systems of the FHA and VA, which are the primary means for insuring the construction of sound homes."

Since no similar certification could be asked of the seller of an existing home, the Senate bill contained a provision, which became Section 226 of the National Housing Act, 12 U.S.C. 1715(q), directing the FHA to require the seller or builder of any property, the financing of which was to be insured by the Administration, to deliver to the purchaser a written statement setting forth the amount of the appraised value of the property as determined by the FHA. This provision was not in the House bill, which had been passed earlier, and so the Conference Report contains a full, and for the purposes of this case a compelling, explanation of the reasons for its adoption:

"Historically, the fundamental soundness of the whole concept of the FHA home mortgage insurance system has rested on the integrity of its appraisal system as a measurement of the long-term economic value of a given residential property to be underwritten with an insured mortgage loan. Basically, the FHA's appraisal system, as well as many of its other principal procedures (such as its property location standards, its minimum construction requirements, and its inspection system), are obviously essential to the proper underwriting of mortgage loan risks, and therefore operate primarily for the protection of the Government and its insurance funds. Nevertheless, the Congress has consistently recognized—and intended—that, notwithstanding the fact that, technically there is no legal relationship between the FHA and the individual

mortgagor, these FHA procedures also operate for the benefit and protection of the individual home buyer. However, there has apparently been a strong tendency on the part of the FHA to view these procedures as operating *exclusively* for the protection of the Government and its insurance funds. The committee of conference does not believe such a view to be consistent with the intent of the Congress in respect of the basic legislation relating to the FHA in the past, and, as to the future, desires to make it abundantly clear that such is not the case.

"In this connection, the committee of conference calls attention to two specific provisions included in the conference substitute which clearly indicate the intent of the Congress that the protections of the FHA system shall also inure to the benefit of the individual home buyers. * * * The other is the provision which requires that the seller or builder or such other person as may be designated by the FHA Commissioner shall agree to deliver, prior to the execution of a contract for the sale of the property, to the purchaser a written statement setting forth the amount of the FHA's appraised value of the property.

"The committee of conference desires to point out the importance it attaches to the latter provision especially at this particular time, in protecting the individual home buyers. Generally speaking, an appraisal of the long-term economic value of a particular residential property represents the informed judgment of a professional technician as to the dollar amount which a well-informed purchaser, acting without duress or compulsion, would be warranted in paying for such property for long-term use or investment . . ." H. Rept. 2271, 83d Cong., 2d Sess., p. 67.

Thus, this Court has been explicitly informed that the FHA inspection and appraisal system, supplemented by the requirement that a statement of the appraised value be furnished a prospective home buyer, was established not in the Government's own interest, but rather so that the home buyer would have "the informed judgment of a professional technician." It follows, therefore, that plaintiffs were within the class of persons to whom the FHA owed a duty of reasonable care in the conduct of its inspection and appraisal program. And the courts below have found, and petitioner does not contest the finding, that in the instant case these functions were negligently performed to the respondents' injury.

2. *The Solicitor General's contention that Section 226 was adopted to give a prospective purchaser protection against the seller is both irrelevant and without substantial support.* The Solicitor General argues that the legislative purpose of Section 226, which requires a copy of the appraisal to be given the purchaser, is "to give the purchaser additional protection against the seller, not to establish a new liability on the part of, and remedy against, the United States" (Pet. Br., p. 21). This contention is but another reflection of the Government's mistaken notion of the nature of a suit under the Tort Claims Act, for the Government's aim is merely to add support to its argument that the Housing Act does not establish a warranty or a guaranty on the part of the Government, and that it does not, of its own terms, impose upon the Government appraisers a duty of due care running in favor of the home purchasers. But, as we have indicated, neither of these considerations is important. To be more specific, it would be irrelevant for purposes of tort law—though arguably the situation in warranty or guaranty is different—even if Congress intended that the appraisal should protect the

purchaser only against the seller, since protection against this hazard is afforded only if the inspection is conducted with due care. And, of course, even the Government does not urge that there can be found in the statute any intention to withdraw the general waiver of sovereign immunity provided by the Tort Claims Act.

Moreover, the fact of the matter is that the danger against which Congress desired to protect the purchaser cannot be as narrowly defined as the Government would wish. From the face of Section 226, and upon the basis of the legislative history cited above, the only reasonable inference is that Congress intended the purchaser to have the normal benefits which flow from the inspection of a dwelling by an independent and competent appraiser—benefits which surely are not limited to protection against unscrupulous or greedy sellers, but which extend, for example, to detection of defects unknown to either party to the sale. The Government's view rests almost entirely upon scattered references to the extensive legislative history of the Act, references which for the most part are directed to other provisions of the legislation under consideration.¹⁹ Moreover, assuming *arguendo* that the narrowly circumscribed Congressional concern postulated by the Government can somehow be strained out of the legislative materials, it would be no more than a generalized concern that is nowhere related to the specific provisions of Section 226.

The remaining portion of the Solicitor General's analysis of the legislative history (Pet. Br., pp. 26-29) is devoted to showing that there is no support for the contention

¹⁹ Footnote 34 of the petitioner's brief, for example, contains the alleged support for the statement in the text that protection for the buyer, in relation to the seller, was intended. None of the twelve references in this footnote bears remotely upon the provision in the proposed legislation which ultimately became Section 226, and considerable straining is required to find such an intention even with respect to the Title I and Title II new construction programs which are the subject of these citations. See also the references relied upon in footnote 38.

that the National Housing Act embodies "a warranty by the government of construction, or guarantee by the government of value received or a right in the purchasers to go against the government for failure to give correct appraisal information." Since no such contention is involved in this action there seems no need to examine into whether the Solicitor General has succeeded in accomplishing the task he has set for himself.

3. *The fact that a governmental program has several objectives does not excuse a failure to exercise due care in its execution.* It is only in the Government's final argument on this phase of the case (Pet. Br., pp. 29-30) that the legislative materials are discussed in the context of general principles of tort law, as opposed to questions of warranty, guaranty, and specific statutory assumptions of liability. The infirmity of the Government analysis of the legislative materials is perhaps best illustrated by the fact that, having finally turned to the field of tort law, the Government is forced to rely upon principles which are simply non-existent.

The Government's argument is that, since the legislative purpose underlying the Housing Act is "primarily and predominantly" to protect the Government, there can be no tort liability, because in the private law of torts a duty of care arises only in favor of those who are "primarily and predominantly" intended to be protected by the activity in question. Not only is the factual premise of this argument incorrect—as we have shown, the protection of the home buyer was at least a primary, if not *the* primary, objective of the Act and of Section 226—but it also appears to be inconsistent with the Government's previous position that the primary purpose of Section 226 is to protect the buyer against the seller. Equally important, however, is the fact that the legal premise, which is stated baldly,

virtually without citation of authority,²⁰ is also erroneous. To be sure, the determination of the class to which a duty of due care arises, as we have indicated, properly includes an inquiry into the purpose of the activity that has been carelessly performed. But there are other considerations, such as the foreseeability of injury and the existence of a reasonable limitation upon the extent of the injury that may be caused by a single careless act, that are equally significant. The statutes that authorize the carriage of mail by truck will be searched in vain for the expression of a purpose to protect the pedestrian from harm, but he may recover under the Tort Claims Act if he is injured through the negligence of the Government driver. On the other hand, the evident purpose to protect mariners which may be inferred from legislation authorizing the Coast Guard to operate lighthouses, aids in describing the protected class when the function is negligently performed. In short, while the expression of a Congressional intent to protect a certain class is weighty indeed when the question is whether a member of that class is owed a duty of care, the absence of such an expression of intent is not by any means controlling.

If the appropriate principles of tort law are applied to this case, the existence of a duty of care owing to respondents is, we believe, perfectly clear. As we have already indicated, the Congressional purpose to benefit home purchasers is a compelling factor. Moreover, even assuming *arguendo* that such a purpose did not clearly appear, the duty of care would arise from other sources. It seems

²⁰ The only support relied upon is an out-of-context quotation from *Ultramares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441. This case stands only for the proposition that where the number of persons who might foreseeably be injured by a careless misstatement is extremely large—where the actor will be exposed “to a liability in an indeterminate amount for an indeterminate time to an indeterminate class”—the duty of care, though it exists, does not run in favor of so large a class.

evident that if an inspection fails to disclose the existence of a structural defect, it is the purchaser who will be injured thereby. Moreover, although the class of prospective purchasers may be large, the injury will be suffered only by one of them and in an amount that cannot be greater than the value of the premises.

We submit, moreover, that liability could be based upon a wholly independent ground. In carrying out its inspection functions the Government has, from the beginning, followed the practice of noting the existence of structural defects and of refusing to insure the mortgage until the defect was corrected. This practice was well known in the industry and was known and relied upon by the respondents. In short, the Government undertook to give warning where there were deficiencies in the property that might have a serious effect upon its market value. It is a universally recognized principle that one who undertakes to warn the public thereby assumes a duty to give adequate warning.

Thus, in *Fair v. United States*, 234 F.2d 288 (C.A. 5), the authorities at a military hospital had promised to warn a Miss Cooper of the release of an Army captain who had threatened to kill her and who was known to have homicidal tendencies. He was released without warning and promptly shot and killed Miss Cooper as well as two detectives that she had hired to protect her. The District Court had dismissed the complaint on the ground that the Government owed no duty to the general public to maintain adequate hospital facilities and that the agreement to warn Miss Cooper of the captain's release was a gratuitous undertaking beyond the scope of the authority of the employee who made it. The Court of Appeals reversed, quoting from the statement in *Indian Towing Co. v. United States*, 350 U.S. 61, that it was hornbook tort law "that one who undertakes to warn the public of danger and

thereby induces reliance must perform his 'good samaritan' task in a careful manner." So, too, in *Dye v. United States*, 210 F.2d 123 (C.A. 6), the Government was held liable under the Tort Claims Act where it had undertaken to give warning of a dangerous condition that existed upstream from an open dam, on the ground that the warning which it gave was not adequate. *United States v. Lawter*, 219 F.2d 559 (C.A. 5), involved a claim growing out of the death of plaintiff's wife attributable to the negligence of Coast Guard personnel in the conduct of a helicopter air sea rescue. The court held that the evidence showed that the Coast Guard had followed a long standing practice of taking over rescue operations, and that "under such circumstances the law imposes an obligation upon everyone who attempts to do anything, even gratuitously, for another not to injure him by the negligent performance of that which he had undertaken." ²¹

In sum, under general principles of tort law, and by virtue of a Congressional purpose to afford protection to persons such as the respondents, or in consequence of its assumed obligation to perform its functions in this area so as to warn prospective purchasers of any structural defects existing in the building at the time its inspection was made, a duty of due care in favor of respondents existed. How-

²¹ A similar holding was made in *Social Security Admin. Baltimore, F.C.U. v. United States*, 138 F. Supp. 639 (D. Md.), where liability was sought to be asserted on the part of a credit union for the negligent failure of Government bank examiners to discover embezzlements being made by one of the credit union employees. The Court held that the Government had no duty to make any audit at all. The Court went on, however, to say: "While the Government owed no duty to the plaintiff credit union to make an audit, to verify accounts and records, or to make reports to the plaintiff credit union of what the examiners found, nevertheless, if an examiner did make some sort of an audit in the course of his examination, and the Bureau sent a report of examination to the plaintiff credit union, the government was obligated not to furnish a report which would be a trap for the ignorant or unwary." *Id.*, at p. 650.

ever this duty arose, it was not fulfilled. The uncontroverted finding of the District Court is that the inspection was negligently made and that this negligence was the proximate cause of the respondents' injury. The judgment, accordingly, must be affirmed unless the action is barred by 28 U.S.C. 2680(h). We turn, accordingly, to a discussion of the effect of that section.

II. RESPONDENTS' CLAIM IS NOT BARRED BY 28 U.S.C. 2680(H)

Petitioner accepts the finding of the court below that the FHA inspector was negligent in failing to discover that the house purchased by respondents had a serious structural defect and so was ineligible for FHA mortgage insurance. It asserts, however, that respondents' injury was caused by their receipt of the report of the appraised value of the house, which was required by Section 226 of the National Housing Act. Relying then upon the line of cases stemming from *Jones v. United States*, 207 F.2d 563 (C.A. 2), cert. denied, 347 U.S. 921, the Solicitor General argues that the United States has not relinquished its sovereign immunity against claims such as the one at bar. Petitioner's contention, reduced to its essentials, is that when there is any communication involved in a chain of events leading to injury, the claim is barred as one arising out of "misrepresentation" within the meaning of 28 U.S.C. 2680(h).

We believe that the Government's argument must fail for two independent reasons. In the first place, as we demonstrate later in the brief, Congress intended by Section 2680(h) to except only deliberate misrepresentation, not negligent misrepresentation. But even assuming *arguendo* that the exception applies to negligent misrepresentation, we believe that respondents' action is not barred. It is this latter contention to which we turn first.

A. This Action Is Not One Arising Out Of Misrepresentation Within The Meaning of Section 2680(h), Even Assuming That This Section Covers Negligent As Well as Wilful Misrepresentations.

The legal test advanced by the Government for determining whether a case falls within the misrepresentation exception in Section 2680(h) appears to be whether an act of misrepresentation was a *sine qua non* in the chain of events which led to the injury. We believe that this simplistic test will not serve to effectuate the intent of Congress and that it is irreconcilable with existing decisional law. But, accepting it as valid for the moment, the fact is that even under this standard respondents should prevail.

The Government has failed to focus clearly upon the chain of events which led to the injury suffered by respondents. Respondents are not complaining of the fact that they were told something that was not true and that in reliance thereon they took action to their detriment. In point of fact, the appraisal report which they received was not given them until the time of the closing of the purchase transaction. By the terms of their contract of sale they were obligated to accept a deed to the property provided only that FHA mortgage insurance was available. It was the availability of this insurance and not the receipt of the appraisal report that caused them to purchase the defective house. Had that mortgage insurance not been issued the respondents could not and would not have purchased the house. They are complaining, then, that the inspector's negligence in the performance of his function of making an inspection of the premises—a function that the Congress has unequivocally stated was intended to offer protection to the prospective home buyer—resulted in the issuance of mortgage insurance and consequently in respondents'

purchase of a defective structure. The fact that there was a communication to them as part of the procedure of providing mortgage insurance is totally irrelevant, since even if through inadvertence the statutory command had not been carried out and this communication had not been made, the same injury, based upon the same negligent act, would still have resulted. Thus it is clear, to use the Government's language, that the communication was not a *sine qua non* of the injury, but that the negligent inspection was. In short, the gravamen of the action is found in the negligent performance of the duty owed to the respondents and not in the fact that the result of this negligent performance was brought to their attention by a report.

This was the analysis of the court below. "It is abhorrent to common sense to hold that the government can relieve itself from liability for neglect of duty owed to an individual merely by telling him falsely that the duty has been faithfully performed; and it cannot be supposed that Congress had any such idea in mind when it included 'misrepresentation' among the exceptions to the statute. Quite clearly the gist of the offense in this case was the careless making of an excessive appraisal so that the home seeker, whom the Commissioner was obligated to protect, was deceived and suffered substantial loss. This was the gravamen of the offense to which the report of the Commissioner was merely incidental." (R. 66). This analysis remains unanswered in the petitioner's brief except for the flat assertion that it was the communication and not the negligent inspection that caused the injury.

The Government has not only misapplied its legal theory to the facts of this case, however. Its more fundamental error lies in the nature of its legal theory. As the court below observed, decisions like *Indian Towing Co. v. United States*, 350 U.S. 61, where the Government was held liable for negligence in the operation of a lighthouse, and *Somer-*

set *Seafood Co. v. United States*, 193 F. 2d 631 (C.A. 4), where the Government was held liable for negligence in marking the location of a wrecked ship, indicate that the existence of an element of misrepresentation in the chain of events leading to injury does not establish that the misrepresentation exception is applicable. The Government concedes the correctness of these decisions, but attempts to fit them within its suggested rationale by way of an explanation which we find rather difficult to follow. So far as we are able to understand it, the Government's position appears to be that where the written or spoken word is an element of the conduct complained of, the United States cannot be liable, while if the misinformation is communicated through other means ("physical direction or guidance"), this absolute bar no longer applies. This distinction, we submit, is untenable. To take the situation in *Somerset Seafood Co.*, for example, surely it cannot be urged that had the United States chosen to issue a report to mariners setting forth the latitude and longitude of the submerged wreck, with the information in error because of the negligent failure to ascertain the correct location, there would be no liability because of the misrepresentation exception. See *Pioneer Steamship Co. v. United States*, 176 F. Supp. 140, 146 (E.D. Wis.). Moreover, the Government ignores cases such as *Eastern Airlines v. Union Trust Co.*, 221 F. 2d 62, 65, 79 (C.A. D.C.), *aff'd*, 350 U.S. 907, where the Government was held liable on the basis of a jury finding that an airport control tower operator negligently told the pilots of two airplanes that both were cleared to land. See also *Johnson v. United States*, 183 F. Supp. 489, 493 (E.D. Mich.); and *United States v. White*, 211 F. 2d 79, 81 (C.A. 9).

Furthermore, contrary to the Government's assertion, its test finds no basis in "traditional legal usage." While there has been little occasion for the common law courts

to struggle with problems of categorization since the general abandonment of the causes of action in favor of fact pleading, nonetheless the courts have sometimes examined the question of the basis of liability where both misstatements and wrongful conduct were involved, and they have not adopted the suggestion that the existence of a verbal misrepresentation as one link in a chain of events requires a holding that an action for damages suffered as a result of the entire chain must be considered an action for misrepresentation.

In the well known case of *Glanzer v. Shepard*, 233 N.Y. 236, 135 N.E. 275, Judge Cardozo vigorously and persuasively rejected the rigid and unanalytical approach here urged upon this Court by the Government. He stated:

"Here the defendants are held not merely for careless words * * *, but for the careless performance of a service,—the act of weighing,—which happens to have found in the words of a certificate its culmination and its summary * * *. The line of separation between these diverse liabilities is difficult to draw. It does not lose for that reason its correspondence with realities. Life has relations not capable always of division into inflexible compartments. The molds expand and shrink." 135 N.E. at 226-7.

This approach is, of course, the one adopted by the Court below. It recognized that the gravamen of the complaint here concerns the careless performance of the appraisal and inspection of respondents' property, and that the formal report of the appraisal was not only merely the culmination and summary of that performance, but, as has been noted, an insignificant and unnecessary link in the causative chain of events.

The Solicitor General states, with a carelessness not usual in his briefs, that the court below erroneously relied

upon *Glanzer v. Shepard*, because in *Ultramares v. Touche*, 255 N.Y. 170, 181-82, "Judge Cardozo himself explained the *Glanzer* decision . . . when he stated that *Glanzer* 'committed us to the doctrine that words, written or oral, if negligently published with the expectation that the reader or listener will transmit them to another, will lay a basis for liability, though privity be lacking.' " (Pet. Br., p. 46) (The emphasis is that of the Solicitor General.)

The quotation from *Ultramares v. Touche* is incorrect, and is, indeed, in direct conflict with the actual decision of the court. The petitioner has quite inexplicably omitted from its quotation the introductory phrase which reads:

"Three cases in this court are said by the plaintiff to have committed us to the doctrine . . ."

Judge Cardozo then went on to reject this explanation of the three earlier cases, one of which was *Glanzer*, in an opinion which reversed the judgment that had been entered in favor of the plaintiff. The reliance by the court below upon the analysis in *Glanzer* was both justified and eminently correct.

The commentators have been no more concerned than the courts with the question that is presented here. Most of the commentators group together in one section torts involving failure to use reasonable care in ascertaining the facts, the absence of the skill and competence required by a member of a particular business or profession, and negligence in the manner of expression. And they do not differentiate between cases in which negligent conduct is the essential basis for recovery and those in which a misstatement of fact is the significant element. This is because they believe and urge that these torts should be governed by essentially the same principles. See Prosser, *Law of Torts* (2d ed. 1955), pp. 542-3; Bohlen, *Misrepresentation as De-*

ccit, Negligence or Warranty, 42 Harv. L. Rev. 733, 746. They are not concerned with distinctions concerning the basis of liability, since they believe that the end result—liability—is the same. But Prosser, for example, expressly recognizes that to achieve this end one accepted (and approved) method is to carry over the historically recognized negligence action (in which the misrepresentation element is traditionally merged to such an extent with the other misconduct that it is not regarded as a separate basis of liability) to appropriate cases which admittedly involve some misrepresentation, even though they do not fall into a traditionally recognized mold.²²

The commentators do not, therefore, offer any specific guide for the disposition of the problem presented here. They do not, because the problem is of no concern to them, suggest any standard for determining when the essence of a cause of action concerns "mere talk or failure to talk" rather than the negligent performance of an act. But it is clear from their discussions that recovery has been allowed in cases involving communications, sometimes in negligence and sometimes in misrepresentation, and the choice of the proper form of action plainly does *not* depend on the mere existence of a verbal communication at some stage of the tortious conduct.

What it does depend upon is suggested by the six cases relied upon by the Government in support of the proposition that claims arising out of negligent misrepresentation are barred by Section 2680(h). Whether an action lies in negligence or misrepresentation turns upon whether there was a duty owed to the plaintiff irrespective of the report

²² Prosser, *Law of Torts* (2nd ed., 1955), pp. 541-5; *Weston v. Brown*, 82 N.H. 157, 131 Atl. 141; *International Products Co. v. Erie R. R. Co.*, 244 N.Y. 331, 155 N.E. 662; *Sult v. Scandrett*, 119 Mont. 570, 178 P.2d 405; *Houston v. Thornton*, 122 N.C. 365, 29 S.E. 827; *Mulroy v. Wright*, 185 Minn. 84, 240 N.W. 116; *Dickel v. Nashville Abstract Co.*, 89 Tenn. 431, 14 S.W. 896; *Brown v. Sims*, 22 Ind. App. 317, 53 N.E. 779.

or other communication that is made. If there was such a duty then the form of action is the common law tort of negligence. Only where the duty is claimed to arise out of the communication itself is the tort that has been committed that of misrepresentation. This analysis is essentially that made by Judge Cardozo in *Glanzer v. Shepard*, *supra*, in which he emphasized that there was a duty to perform carefully the activity in question (that of weighing beans) running in favor of the plaintiff, which was independent of the fact that the results of the weighing were transmitted to the plaintiff in a report. It is also the analysis adopted by the court below (R. 61-62).

On this analysis none of the cases cited by the Government alleged a cause of action in negligence. Thus, *National Mfg. Co. v. United States*, 210 F. 2d 263 (C.A. 8), cert. denied, 347 U.S. 967, and *Clark v. United States*, 218 F. 2d 446 (C.A. 9), involved actions to recover for damages to property caused by flood. The plaintiffs alleged that various government agencies had negligently carried out their functions of giving accurate warning and flood information. In both cases the courts held that suits against the United States as a result of flood damage were barred by the 1928 Flood Control Act, which had not been repealed by the Federal Tort Claims Act. As the court stated in the *Clark* case, 218 F. 2d 446, at 452:

"Neither the United States as land owner nor H.A.P. as landlord owed the tenants any flood fighting duties. The gist of appellant's case against the United States by virtue of the action of H.A.P. and its employees is that H.A.P. undertook to inform and advise its tenants and that it negligently carried out this undertaking and issued false assurances of safety. Thus the charge against the United States through H.A.P. is

basically one of negligent misrepresentation.”²³ (Emphasis supplied.)

It is clear, therefore, that in those cases it was the representation itself and not any pre-existing obligation on which the action was grounded. Such, of course, was not the case in *Glanzer v. Shepard*, *supra*, nor is it true of the case at bar.

Miller Harness Co. v. United States, 241 F. 2d 781 (C.A. 2), and *Jones v. United States*, 207 F. 2d 563 (C.A. 2), cert. denied, 347 U.S. 921, likewise involved situations in which no duty was owed the plaintiff by the United States. In the *Miller Harness* case the plaintiff had purchased surplus government property by bidding thereon, and had specifically inquired whether certain parts were included with the material offered for sale. A Government employee had informed the plaintiff that the parts were included, but upon receipt of the property it developed that they were not. The complaint alleged a cause of action for breach of contract as well as in tort, and the court held with respect to the contract action that the buyer had taken the risk that the boxes of material did not contain the parts which he hoped they would. It appears, therefore, that no duty of care applied in this regard. Consequently, the court was able to hold, with respect to the tort action, that the alleged damage arose solely out of the misrepresentation which had been made over the telephone. Similarly, in the *Jones* case not only was no specific duty of care al-

²³ Petitioner argues, in the face of explicit holdings in these cases that there was no duty of care owed to the plaintiffs, that the discussion of the “applicability of the misrepresentation exception . . . clearly was premised *arguendo* on an assumption that a duty was owing.” (Pet. Br., p. 48, fn. 63.) But as the passage quoted in the text above demonstrates, it would be more accurate to say that the exception was held applicable not in spite of the existence of a duty of care but because a duty of care did not exist.

leged in the complaint, but the complaint in terms alleged causes of action based on the negligent and deceitful statement by government employees of an incorrect estimate of the oil producing capacity of certain lands in which the plaintiff was interested.

The Government also relies heavily upon *Hall v. United States*, 274 F. 2d 69 (C.A. 10), and *Anglo-American and Overseas Corp. v. United States*, 144 F. Supp. 635 (S.D. N.Y.), aff'd, 242 F. 2d 236 (C.A. 2), but these cases go no further than the cases already discussed. The opinion of the Court of Appeals for the Second Circuit in *Anglo-American* merely stated, in affirming the decision of the District Court, that the claim, brought by a dealer in tomato paste, "arose out of" an assertedly negligent representation of the quality of the paste by Federal employees.²⁴ The reason for this conclusion appears clearly in the opinion of the District Court. That Court first held:

"The duty imposed on the defendant under the Pure Food, Drug and Cosmetic Act was a duty primarily owing to the ultimate consumer and not to the innocent dealer. The act shows no concern for dealers in adulterated products. . . . No provision of the Act suggested that [plaintiff] was protected from liability by a prior Government inspection. . . ." 144 F. Supp. 635, 636-37.

It is thus clear that in *Anglo-American* there could have been no finding, such as that made by the courts below in the instant case, that the Government had negligently performed a specific duty owed to the plaintiff. Moreover, when considering the applicability of the exception of Sec-

²⁴ The essential facts of this case are set forth in the Government Brief at p. 40.

tion 2680(h) for misrepresentation; the District Court expressly held:

" . . . [P]laintiff could not have been injured here but for the implied representation that the tomato paste did not violate the Act which it read into the form release notice issued by defendant. Inasmuch as the statute did not require the testing of every import, the mere fact that the tomato paste entered the country and took its place in the stream of interstate commerce did not imply any prior-test by defendant. The statute did not impose upon the government an absolute duty to keep out all adulterated food but rather a duty, to the extent of the appropriation provided, to reduce the importation of adulterated food by testing such samples as the Secretary of Health, Education and Welfare deemed advisable. Aside from the representation which might be implied from the form of the release notice, plaintiff could have had no basis to assume that any specific lot of food had been tested." *Id.*, at p. 637.

In the case at bar, however, a different result is required since it is agreed that an inspection of the premises is conducted *in every case* where mortgage insurance is to be issued, that issuance of the mortgage insurance necessarily rests upon an inspection and appraisal and that these facts were known to respondents.

The opinion in the *Hall* case does not set forth the nature of the statute under which the testing of the cattle there involved was conducted. It is quite clear, however, that it could not have been alleged that there was any statutory or other duty of due care owed to the plaintiff by the United States with respect to the testing of the cattle. Certainly, the opinion fails to make any reference

to any such contention. It would appear, moreover, as in the *Anglo-American* case, that the purpose of any such testing program would be the protection of the general consuming public, so that the duty found by the court below finds no analogy in the *Hall* case.²⁵

Otness v. United States, 178 F. Supp. 647 (D. Alas.), affords an example of a case in which a specific pre-existing duty was owed by the Government to the plaintiff and in which the existence of a verbal representation was, therefore, merely incidental or supplemental to the performance of that duty. In that case, which involved a claim for damage to plaintiff's vessel as a result of the negligent maintenance of maritime aids by the U. S. Coast Guard, judgment was rendered for the plaintiff. Among other things, it had been alleged that a bulletin circulated among mariners by the defendant had given incorrect information with respect to the location of a particular maritime aid. The court held that, although misstatements of fact had been made by the Government, there were antecedent negligent acts involved which constituted a proper basis for judgment against the United States. It stated:

"Although the plaintiff is not entitled to recover for loss occasioned by reliance upon the negligent misrepresentation of the defendant, this immunity does not absolve the defendant of his responsibility to exercise due care for those duties voluntarily assumed. Therefore, since this defense, though valid and successful in part, does not pierce the negligent acts complained of, said defense is ineffective as a bar to recovery." *Id.*, at p. 652.

²⁵ The tests were conducted under a program which included the imposition of severe restrictions upon the transportation in interstate commerce of cattle infected with brucellosis, a disease highly contagious to other cattle. See 9 C.F.R. Part 76.

Thus, the analysis of the lower courts in the instant case is supported by the decisions of the various federal courts which have been confronted with the necessity for determining whether a cause of action is essentially grounded in negligence or constitutes a claim for negligent misrepresentation. When, as in those cases cited by the Government in which recovery was denied, there is no specific duty owed to the plaintiff by the defendant independently of the representation itself, it has been concluded that the action is one for negligent misrepresentation. When, on the other hand, there is a specific duty which has been negligently performed, the action should be treated as one for negligence despite the presence of a communication at some stage in the performance of the duty. Each of the cases relied on by the Court of Appeals, *Indian Towing Co. v. United States*, 350 U.S. 61, and *Somerset Seafood Co. v. United States*, 193 F. 2d 631 (C.A. 4), involved the negligent performance of a specific duty, and the claims were regarded as sounding in negligence even though the performance of the duty culminated in a representation to the plaintiff. The *Otness* case reached a similar result. And similar analyses may be found in decisions in other jurisdictions. See *Brown v. Sims*, 22 Ind. App. 317, 53 N.E. 779 (defendant held liable to purchaser of property for supplying incorrect abstract of title to seller, when defendant was aware that it would be relied on by the purchaser); *Dickel v. Nashville Abstract Co.*, 89 Tenn. 431, 14 S.W. 896 (similar to *Brown* case); *Mulroy v. Wright*, 186 Minn. 84, 240 N.W. 116 (City Clerk held liable to purchaser of property for issuing to seller incorrect certificate that no assessments applied, knowing that purchaser would rely on it); *Sult v. Scandrett*, 119 Mont. 570, 178 P. 2d 405; and *Tredway v. Ingram*, 102 Pa. Super. Ct. 459, 157 Atl. 4 (no liability for false statement that materials furnished to

builder had been paid for because no duty of care to prospective mortgagee).

It should be noted that these rules, as they have been applied by the courts, limit sharply the number of cases in which the furnishing of incorrect information by the Government can give rise to liability under the Tort Claims Act. Recovery cannot be based upon the misrepresentation alone since it is necessary to show that there was a duty of care owed to the claimant, not merely when he was given the misinformation, but also when the facts were ascertained. And, of course, it is also necessary to show that there was negligence on the part of the Government employee either in ascertaining or imparting the facts.

B. The Misrepresentation Exception Was Intended to Include Only Claims Based Upon Deliberate Misrepresentations of Fact

Assuming, contrary to our view, that respondents' cause of action is grounded in misrepresentation, the action nonetheless would be for *negligent* misrepresentation, and it is our position that the exception of Section 2680(h) was not intended by Congress to include negligent misrepresentations. At the outset, of course, we must agree with the Government that the fact that five Courts of Appeals have rejected the argument we here advance is entitled to considerable weight in this Court. Nonetheless, we respectfully maintain that these lower court decisions are wrong, and that they have failed to give due consideration to the statutory purpose and legislative history of the Tort Claims Act.

1. *The statutory purpose.* On its face, Section 2680(h) reflects an intention on the part of Congress to relieve the United States from liability caused by the deliberate acts of its employees. It includes eleven torts which, except for the omission of trespass, include all of the wilful torts

which were generally known to the common law. The natural inference, therefore, would be that "misrepresentation" was meant to include only wilful misrepresentation. This conclusion, moreover, is fully supported by the legislative history.

The Tort Claims Act was enacted only after consideration by a number of sessions of the Congress.²⁶ The provision that became Section 2680(h), however, did not change appreciably from the way it read in the original bill that was introduced in the 76th Congress. This provision was explained to the Senate Committee by Judge Holtzoff, at that time a Special Assistant to the Attorney General, as excluding a type of tort that would be difficult to defend against and which could be easily exaggerated. Hearings on S. 2690, before a Subcommittee of the Judiciary Committee of the Senate, 76th Cong., 3rd Sess., p. 39.

²⁶ Because the Tort Claims Act, although finally adopted by the 79th Cong., 2d Sess., received only ~~part~~ consideration in that session, the legislative history relating to the consideration of the virtually identical bills by earlier Congresses is more persuasive than would ordinarily be the case. *United States v. Spelar*, 338 U.S. 220, fn. 9, describes the course of Congressional consideration leading up to the adoption of the Act:

"The shape of the Federal Tort Claims Act was largely determined during its consideration in the course of the 77th Congress. Subsequently the bill was reintroduced without substantial modification or further hearings until its enactment during the 79th Congress. The revised version of the tort claims bill introduced during the 2d session of the 77th Congress, S. 2221, was reported favorably by the Senate Committee on the Judiciary (S. Rep. No. 1196, 77th Cong., 2d Sess.), and passed the Senate. 88 Cong. Rec. 3174. The House Committee on the Judiciary, to which it was then referred, and which had been holding hearings on H.R. 6463, the companion measure to S. 2221, the bill passed by the Senate, reported the bill favorably (H.R. Rep. No. 2245, 77th Cong., 2d Sess.), but it was never considered by the House. It was reintroduced in the 78th Congress (H.R. 1356, 78th Cong., 1st Sess.; S. 1114, 78th Cong., 1st Sess.), but no action was taken and again in the 79th Cong., (H.R. 181, reported in H.R. Rep. No. 1287, 79th Cong., 1st Sess.). It was finally passed by the 79th Congress as part of the omnibus Legislative Reorganization Act. 60 Stat. 842."

A somewhat different explanation was given by Judge Holtzoff to a committee of the House during the same Congress. He explained, referring to the entire section that is now 28 U.S.C. 2680, that there had been exempted "tort claims that would be difficult to defend or in respect to which it would be unjust to make the government liable."²⁷

The explanation that these suits would be difficult to defend has been regarded by the commentators as insufficient to justify the exceptions found in Section 2680(h). It is noteworthy, however, that they have uniformly viewed this section as one that deals exclusively with wilful torts. "The reason [that suits will be difficult to defend] is not altogether persuasive since defending against a charge of wilful misbehavior should be no more difficult than defending against a charge of negligent behavior." Gellhorn and Schenk, *Tort Actions Against the Federal Government*, 47 Col.L.Rev. 722, 730. "The legislative history contains a thoroughly unpersuasive reason for excepting the specified wilful torts." 3 Davis, *Administrative Law Treatise*, p. 470. "Section 421(h) is the 'basket' or general clause of the section excluding 'any claim arising [out of the torts specified in 28 U.S.C. 2680(h)].' These are *deliberate* torts, well established in the common law. . . . These exceptions are in accord with the exclusion of punitive damages under Section 410(a) of the Act and together show the intent of Congress to exclude cases involving malicious and wilful torts from the pattern of this remedial legislation." Gottlieb, *The Federal Tort Claims Act—A Statutory Interpretation*, 35 Geo. L.J. 1, 49. See also, Note, *The Federal Tort Claims Act*, 56 Yale L.J. 543. (Emphasis supplied throughout.)

The testimony given by the Department of Justice during consideration of the legislation and the Committee reports

²⁷ Hearings before Subcommittee No. 1 of the House Committee on the Judiciary on H.R. 7236, 76th Cong., 3rd Sess., p. 22.

confirm the fact that this general understanding of the function of Section 2680(h) was the correct one. In explaining this provision to the Judiciary Committee of the House of Representatives, 77th Cong., 2d Sess., which was holding hearings on H.R. 5373 and 6463, Assistant Attorney General Shea explained (p. 33):

"The other exceptions in Section 402 relate to certain governmental activities which should be free from restraint of damage suits or for which adequate remedies are already available. The exemptions include claims arising out of the loss or miscarriage of postal matter, the assessment or collection of taxes or duties, military or naval activity during wartime, the detention of goods by customs officers, deliberate torts, such as assault and battery, and some others."

See also the formal statement submitted by the Department of Justice, at p. 28 of the hearings. Mr. Shea's statement that Section 2680(h) encompassed deliberate torts was adopted in S. Rept. 1196, 77th Cong., 2d Sess., p. 7, and repeated in H. Rept. 2245, 77th Cong., 2d Sess., p. 10, as well as in H. Rept. 1287, 79th Cong., 1st Sess., p. 6, and S. Rept. 1400, 79th Cong., 2d Sess., p. 33, the latter two reports being those of the committees of the Congress that adopted the legislation.²⁸

²⁸ The Solicitor General quotes only from S. Rept. 1400, 79th Cong., 2d Sess. and appears to argue that because there was a semicolon (rather than a comma, as in the Department of Justice statement to the committee) between the words "assault and battery" and the words "and others," this reflects an understanding by the committee that this section included nonwilful torts as well as deliberate torts. (Pst. Br. p. 37.) If the entire paragraph from which the quotation is taken is read, however, it is apparent that "and others" referred not to the other torts enumerated in Section 2680(h) but to the other exceptions found in the remainder of the section (such as those relating to injuries inflicted during a passage through the Panama Canal or caused by the imposition of a quarantine).

If Assistant Attorney General Shea's explanation is read in connection with Judge Holtzoff's, the purpose of Section 2680(h) becomes evident. It seems clear enough that, while exceptions such as those relating to the regulation of the monetary system might well be regarded as protecting "governmental activities which should be free from the restraints of damage suits," the same could not be said for Section 2680(h) provisions covering, for example, assault and battery. Thus, Mr. Shea must have regarded such provisions as involving activities "for which adequate remedies are already available." This should be considered in the light of the further purpose to preclude recovery of damages in cases where it would be "unjust to make the government liable." This could reasonably be said of deliberate torts, which generally involve wrongs committed by employees in their individual capacities and not as government servants,²⁹ but could hardly be said of torts such as negligent misrepresentation. In short, only if Section 2680(h) is restricted to deliberate torts can effect be given to Congress' evident purpose to permit recovery except where it would be unjust to make the Government liable and where the injured party could be left to his "adequate remedy" against the individual employee, with the additional remedy of a private bill available for the unusual special case. The negligence that caused respondents' injury in this case is assuredly not the type of conduct that was intended to be encompassed by Section 2680(h). On the contrary, it was precisely the kind of careless act, performed in carrying out a function authorized by law, for which Congress accepted responsibility in Section 1346(b).

The Government does point out that under one analysis it can be argued that some of the other torts excepted by

²⁹ "[I]t might be that these exceptions were considered as involving activities which practically, even though not legally, speaking are outside the scope of a government employee's proper official functions. . . ." *Panella v. United States*, 216 F.2d 622, 625 (C.A. 2).

Section 2680(h), such as libel and slander and interference with contract rights, can be committed negligently rather than deliberately. (Pet. Br., 37-38.) But the cases relied upon can also be viewed as establishing the doctrine that an actual intent to injure is not a necessary element of these causes of action. The deliberate character of the wrongful conduct is still present, however, and the gist of these actions remains the libel or the assault or the interference with the contract rights. Harper and James, for example, in their treatise on the *Law of Torts* (Sec. 6.10, p. 509) conclude, after an extensive discussion, that "as a general rule liability for negligent interference with contractual relations does not exist." See also their discussion of accidental defamation at pp. 363-364.

Moreover, even if it be accepted that unusual instances may be found where the torts set forth in Section 2680(h) were committed because of the negligent rather than the deliberate acts of the defendants, this does not alter the essential nature of these torts as deliberate rather than negligent. The exceptional or idiosyncratic example does not determine the nature and character of the entire class. Any first year law school student would be able to identify the single element, deliberateness, which is common to the torts enumerated by Section 2680(h). The exception should thus not be allowed to disprove the rule or to overcome what was the evident and stated intent of the Congress.

Finally, we think it appropriate to note that some cases relied upon by the petitioner were erroneously decided. In *Moos v. United States*, 225 F.2d 705 (C.A. 8), for example, the plaintiff entered a Veterans Administration hospital for treatment of a service-connected injury to his left leg and hip. While he was under an anesthetic the surgeon negligently performed an unnecessary operation upon his right leg and hip. The action was held to be barred by Section 2680(h). The court explained that performing an operation without a patient's consent constituted an

assault and battery, pointing out that a surgeon is liable in such a case without proof of intent or negligence. It did not occur to the court, apparently, that the fact that recovery could be had independently of negligence ought not to have prevented the action from being based upon the actual negligence rather than the technical assault.³⁰ Thus, a rule of law fashioned to make recovery more readily available to an injured plaintiff was applied to prevent recovery. Had the sounder analysis of the court below been followed it would have been recognized that the gist of the surgeon's offense was his negligence in operating on the wrong leg and a claim that Congress obviously intended to allow would not have been denied.

³⁰ In this connection a colloquy between members of the House Judiciary Committee and the Assistant Attorney General during the Hearings on H.R. 5373 and H.R. 6463 in the 77th Cong., 2d Sess., at pp. 33-34, is most instructive:

"Mr. ROBISON: On that point of deliberate assault, that is where some agent of the government gets in a fight with some fellow?

"Mr. SHEA: Yes.

"Mr. ROBISON: And socks him?

"Mr. SHEA: That is right.

"Mr. CRAVENS: Assume a CCC automobile runs into a man and damages him, then under the common law, where that still prevails, is not that considered an assault and is the action based on assault and battery?

"Mr. SHEA: I should think not. I should think under old common law that would be trespass on the case.

"Mr. CRAVENS: Trespass on the case?

"Mr. SHEA: Yes.

"Mr. CRAVENS: I do not remember those things very well but it seems to me that there are some cases predicated on assault and battery even though they were personal injury cases.

"Mr. SHEA: No; I think under common law pleading you have the same writ, but it makes a distinction between assault and negligence.

"Mr. CRAVENS: This refers to a deliberate assault?

"Mr. SHEA: That is right.

"Mr. CRAVENS: If he hits someone deliberately?

"Mr. SHEA: That is right.

"Mr. CRAVENS: It is not intended to exclude negligent assaults?

"Mr. SHEA: No, an injury caused by negligence could be considered under the bill."

2. *The Earlier Cases.* In view of the cogent reasons in support of our construction of the statute it is surprising to find the lower courts in agreement that Section 2680(h) bars suits for negligent misrepresentation. But we believe that an examination of the course of decision that led to this unanimity will disclose that the question has never been ^{given} a searching examination by any court, and we suggest further that the reasons advanced by the lower courts for their conclusion are unpersuasive.

The issue first arose in *Jones v. United States*, 207 F.2d 563 (C.A. 2), cert. denied, 347 U.S. 921, and was decided in a one paragraph opinion which, we respectfully suggest, was poorly considered. The only reason given by the court for its conclusion that Section 2680(h) embraced negligent misrepresentation was that such a construction was necessary in order to give some content to the term "misrepresentation," in view of the inclusion in the section of the term "deceit." To be sure, the canon of statutory construction relied upon by the court is one of ancient standing and is frequently useful in finding the intent of the legislature where a statute itself is not clear.³¹ But as this

³¹ The Solicitor General also relies upon this canon of construction. It seems fair to say, however, that it should be used only with caution. Certainly Congress in drafting legislation, much as lawyers in drafting contracts, frequently falls into the habit of using several words where one would do. Scores of examples could be readily supplied. Three are given below:

(a) Section 2(1) of the Securities Act of 1933, 15 U.S.C. 77b, as well as similar provisions of other federal securities acts, defines "security" as ". . . any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of interest in property, tangible or intangible, or, in general, any instrument commonly known as a security, or any certificate of interest or participation in, temporary or interim certificate for, receipt for or war-

Court has repeatedly stated, "However well these rules [of statutory construction] may serve at times to aid in deciphering legislative intent, they long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy." *S.E.C. v. Joiner Corp.*, 320 U.S. 344, 350-351. "A restrictive meaning for what appear to be plain words may be indicated by the Act as a whole, [or] by the persuasive gloss of legislative history. . . ." *United States v. Witkovich*, 353 U.S. 194, 199. It is noteworthy that the Court in the *Jones* case made no effort to examine the legislative history of this provision of the Tort Claims Act.

An equally venerable canon of statutory construction would seek the meaning of an ambiguous word or term by examining the associated words which accompany it in the statute. "It is a familiar rule in the construction of terms to apply to them the meaning naturally attaching to them

rant or right to subscribe to or purchase, any of the foregoing." Surely either "note" or "debenture" or both could have been omitted without loss.

(b) The phrase "service, route or line" appears in several sections of the Merchant Marine Act of 1936, 46 U.S.C. 1101 ff. See, e.g., Section 21, 46 U.S.C. 1121, and Section 605c, 46 U.S.C. 1175(c). Since 1936 these words have consistently been considered to have identical meanings. Indeed, when the bill was under consideration Mr. Ira Campbell, the principal industry representative, testified: ". . . [T]hroughout this bill the words 'service, routes, lines' seem to be used synonymously." Hearings before the Committee on Merchant Marine and Fisheries on H.R. 7521, 74th Cong., 1st Sess., p. 644. This did not prevent the use of the phrase in the Act as adopted.

(c) 28 U.S.C. 2680(h) excepts from the coverage of the Tort Claims Act "claims arising out of . . . misrepresentation, deceit. . . ." Whether "misrepresentation" be given the interpretation urged by the Solicitor General or that suggested by respondents, the word "deceit" seems to be unnecessary.

from their context, *Noscitur a sociis* is a rule of construction applicable to all written instruments. Where any particular word is obscure or of doubtful meaning, taken by itself, its obscurity or doubt may be removed by reference to associated words. And the meaning of a term may be enlarged or restrained by reference to the object of the whole clause in which it is used." *Virginia v. Tennessee*, 148 U.S. 503, 519. "[T]he subtle signification of words and the niceties of verbal distinction furnish no safe guide for construing the act of Congress. On the contrary, it should be interpreted and enforced by the light of the fundamental rule of carrying out its purpose and object, [and] of affording the remedy which it was intended to create. . . ." *Rhodes v. Iowa*, 170 U.S. 412, 422.

The "dominating general purpose" of the Tort Claims Act was set forth in *Indian Towing Co. v. United States*, 350 U.S. 61, 68-69:

"The broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable and not to leave just treatment to the caprice and legislative burden of individual private laws. Of course, when dealing with a statute subjecting the Government to liability for potentially great sums of money, this Court must not promote profligacy by careless construction. Neither should it as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it."

If Section 2680(h) is read in the light of this general purpose there seems no reason whatever to give the term "misrepresentation" the unnecessarily broad meaning adopted by the Second Circuit. Certainly the tests de-

scribed above provide more assurance that the intent of Congress will be effectuated than the formula employed in *Jones*, and, as we have indicated, their application to this case leads to the conclusion that Section 2680(h) does not bar suits based upon negligent misrepresentation.

It is possible that the *Jones* court might have given less attention to the Section 2680(h) issue than it deserved because of the obvious lack of merit of the plaintiff's overall claim. The plaintiff owned some stock in a corporation which held certain leaseholds of oil lands from the United States. Prior to selling the stock he wrote to the Geological Survey and asked for its estimate of the recoverable reserves underlying the land in question. He was told that the reserves amounted to approximately one-third of the actual reserves. Plaintiff had alleged that this information was incorrect and that, had the correct figure been given him, he would not have sold his stock and thus would have made a substantial profit. The very brevity of the court's opinion suggests that the obvious impossibility of permitting such a claim to lie caused it to adopt, uncritically, the first apparently plausible rationale that came to mind.

The other cases cited in the Government's brief appear to have been decided primarily upon the authority of *Jones*, and, at least so far as the opinions demonstrate, without extensive reconsideration of the problem. Moreover, as we have indicated in our prior discussion of these cases, pp. 32-36, *supra*, in each of them there was no duty of care owed by the United States to the plaintiff, and consequently, as in *Jones*, there was no necessity for reliance upon Section 2680(h).

The only reason advanced in these subsequent cases beyond the grounds relied upon in *Jones* is the danger of imposition of excessive liability upon the United States if suits could be maintained for negligent misrepresentation. As the court below put it, "[I]t is reasonable to suppose

that Congress intended to exempt the Government from liability and misinformation carelessly given by its agents to the public in the field of its manifold activities." (R. 59-60.) The Solicitor General, on the other hand, does not adopt this rationale of the court below but does refer to the allegedly drastic consequences that might follow upon affirmance of the judgment below, apparently as an independent ground for reversal.

The short answer to the Government's contention is that given by this Court in *Rayonier, Inc. v. United States*, 352 U.S. 315, 319-20:

"The government warns that if it is held responsible for the negligence of Forest Service firemen a heavy burden may be imposed on the public treasury. It points out the possibility a fire may destroy hundreds of square miles of forests and even burn entire communities. But after long consideration, Congress, believing it to be in the best interest of the nation, saw fit to impose such liability on the United States in the Tort Claims Act. Congress was aware that when losses caused by such negligence are charged against the public treasury they are in effect spread among all those who contribute financially to the support of the government and the resulting burden on each taxpayer is relatively slight. But when the entire burden falls on the injured party it may leave him destitute or grievously harmed. . . . There is no justification for this Court to read exemptions into the Act beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it."

There is no support for the position of the court below either in the statutes or the legislative history. But since it is arguably not unreasonable, in seeking to give content to the term "misrepresentation," to assume a Congres-

sional intention to avoid the possibility of enormous liability, it is important to recognize that no such potential liability exists regardless of which of the two suggested interpretations of the term "misrepresentation" is adopted by this Court. The United States is liable under the Tort Claims Act only "to the same extent as a private individual under like circumstances" and only "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." By thus insuring that the Government's liability would extend only this far, the sensible limitations upon the potential liabilities of private persons that have been erected by the common law were also provided the United States.

Since it is to Virginia that we are directed to look for the tort law governing this case, it would appear appropriate to look first to the law of that state to see what these limitations are. However, apparently no one has even urged upon the Virginia courts that a private person should be liable for the types of negligent conduct referred to at pp. 50-51 of the Government's brief.³² The course of decision in New York, on the other hand, which has already been adverted to both in this brief and by the Solicitor

³² Only two cases have been found that bear at all on this issue. In *Valz v. Goodykoontz*, 112 Va. 853, 72 S.E. 730, recovery was allowed against a contractor who had assured an employee of a railroad that certain blasting operations had been completed and that it was safe to proceed, when that representation was false and the plaintiff was injured by a subsequent explosion. The court stated that, "It was negligence on his part to have . . . assured the plaintiff of the safety of the place . . ." In *B.W. Acceptance Corp. v. Benjamin T. Crump Co.*, 199 Va. 312, 99 S.E. 2d 606, recovery was allowed by the purchaser of a trust receipt against the distributor with whom it had entered into a distributor agreement, where the distributor had incorrectly informed the plaintiff that it had delivered certain goods to a retailer. This caused plaintiff to believe that its lien had priority when in fact it was subordinate to others. Obviously, in neither case does the rule adopted, by implication or otherwise, suggest the type of liability which the Government fears.

General, affords an excellent illustration of the nature and extent of the liability that has been imposed in this area by the common law courts.

Glanzer v. Shepard, 233 N.Y. 236, 135 N.E. 275, in which a public weigher was held liable to the vendee of beans on the basis of an erroneous statement of their weight, has already been discussed, *supra* p. 29. It was followed by *Jaillet v. Cashman*, 235 N.Y. 511, 139 N.E. 147, with a claim against the operator of a ticker service for damages which resulted when the plaintiff sold his stock because of an erroneous ticker report. Recovery was denied on the ground that the relationship between the plaintiff and defendant was similar to that between the public and a newspaper publisher.³³ Both the *Glanzer* and *Jaillet* cases were then considered and discussed in *International Products Corp. v. Erie R.R. Co.*, 244 N.Y. 331, 155 N.E. 662, in which an importer sued a railroad company for damages suffered when the defendant erroneously identified for plaintiff the warehouse in which certain property of the plaintiff was to be stored by the railroad. The plaintiff was unable properly to insure the property because of this error, and sued for the value of the insurance after a fire in which the property was destroyed. It was held that the railroad was liable to the importer in this instance. The court stated, citing *Jaillet*, that the *Glanzer* rule had its limits—that not every casual response or idle word gives rise to a cause of action, that liability exists, *inter alia*, only where the relationship between plaintiff and defendant is such that in morals or good conscience the one has the right to rely on the other for the information involved, and the one giving it owes a duty to give it with care. This line of cases reached its culmination in *Ultramares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441, in which liability against a firm of accountants

³³ See also *MacKown v. Illinois Publishing and Printing Co.*, 289 Ill. 59, 6 N.E. 2d 526.

that had certified a financial statement on the basis of a carelessly conducted audit was denied, on the express ground that the possible consequence of finding a duty of care by the defendant to the plaintiff would have imposed an unconscionable burden.

These cases clearly establish the error of the Government's suggestion that one of the potential consequences of the ruling below would be to subject the Federal Government to unlimited liability in situations where it communicates information to its citizens generally for their aid and guidance. These cases make it clear that no liability would be found under the common law for erroneous information published to the world at large.³⁴ Prosser concludes that even where there is an intent to mislead, the doctrine of transferred intent³⁵ is rejected for the obvious reason that the class of persons who may conceivably learn of a misstatement is so enormous that an impossible burden might be cast on anyone who makes a false assertion, and that this view has been followed by numerous American courts.³⁶ It further appears that even where there is an intention to influence a very large class of persons, liability is denied for the same reason.³⁷ And, Prosser concludes, again for the same reasons, there is general agreement that with respect to unintentionally false state-

³⁴ The Government's reference to the potential liability which might flow from erroneous information contained in a registration statement filed with the Securities and Exchange Commission and reviewed by that agency ignores the commonly known fact that all publications of such statements contain a clear statement that the approval of the agency cannot be inferred from the publication of the statement, a caveat which would unquestionably absolve the Government from liability in any event.

³⁵ *I.e.*, an intent to deceive not only the person to whom a representation is made, but others to whom he might foreseeably retransmit the information.

³⁶ Prosser, *Law of Torts* (2d ed. 1955), at 539-41.

³⁷ *Ibid.*

ments liability is similarly restricted. A duty of care will not be found even where it is known that the recipient of information intends to make commercial use of it in dealing with unspecified strangers, as in the case of attorneys, abstractors of title, inspectors of goods, accountants, surveyors or operators of ticker services, because of the possibility of liability so great and so out of proportion to the fault involved.

In the instant case, as in *Glanzer*, this problem is not posed. Only one person could buy the home in question. The limit of the Government's liability, in any event, is the total value of the home, and not, as in the other cases discussed, an unlimited liability to numerous individuals in a class which is theoretically without limit. A single accountant's report or a bulletin to farmers, if incorrect, either intentionally or negligently, might give rise to liability to an unlimited number of different individuals in virtually unlimited amounts. It is a risk which could not be insured against, and it is a risk which common law courts have been unwilling to impose.

This is the tenor of the concurring opinion of Judge Johnsen in *National Mfg. Co. v. United States*, 210 F.2d 263, 280 (C.A. 8), *cert. denied* 347 U.S. 967, which is incorrectly discussed in the Government's brief (pp. 50-51). It is true, as the Government notes, that Judge Johnsen did list a number of situations in which the Government disseminates information, and where, if liability for negligence were found, the claims might be infinite. But he cited these examples in order to establish another valid ground for denying the claim made in that case for damages resulting from the dissemination of erroneous flood information. In his concurring opinion, which in turn was concurred in by a second member of the court, it was held, as respondents urge here, that there is no tort liability in such situ-

ations. He stated that the second ground for denying the claim there presented was (at 279):

"... the equally absolute policy which has always existed in the common law, that the dissemination or nondissemination of public information, not of a personal character, is without any basis of a tort in respect to its accuracy. This has been true where the dissemination is engaged in by a private citizen, such as a newspaper or a radio station, just as much as where it is engaged in by the Government. In both situations, whatever duty of care or of integrity might be argued morally to underlie the gathering or dissemination of such information has been regarded legally as being simply a duty owed to the public at large and not to the individual. And, on historic common-law principle, where no duty is owed to an individual, there is no basis for him to claim a wrong or a tort against him."

Judge Johnsen's opinion does not support, but rather establishes the lack of basis for, the Government's fears. It expresses concisely the general rule which establishes beyond a doubt that the decision of the court below, limited to the facts here involved, does not subject the Government to unlimited or unconscionable liability, for the simple reason that whereas the factors here present define a common law tort, the situations conjured up by the Government as the basis for its fears do not.³⁸

³⁸ It should also be noted that the Government's reference (Pet. Br., p. 29, fn. 46) to the total amount of mortgage insurance issued by the FHA likewise does not provide a valid ground for fear of unlimited or unconscionable liability under the decision of the court below. The amounts of the individual mortgages insured under the program were unquestionably relatively small. It could hardly be suggested that the great bulk of these appraisals were negligently arrived at. And the problems of proving negligence in the performance of a professional function, such as rendering an appraisal in this area, are well known.

CONCLUSION

The reasoning of the court below is sound in its conclusion that the gravamen of the action is the negligent inspection, and should be adopted by this Court as the basis for its affirmance of the judgment. Should the Court reach the question of the interpretation of the word "misrepresentation" in 28 U.S.C. 2680(h), it should hold that only deliberate misstatements of fact were intended to be excluded from the coverage of the Act and the judgment below should be affirmed on this ground.

Respectfully submitted,

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